FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 27 1937
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

MAY TERM, 1937

No. [redacted] 87

WILLIAM D. FRAD,

Petitioner,

against

JOHN J. KELLY, United States Marshal for the Southern District of New York, UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

WILLIAM D. FRAD,
By Louis Karasik
and Harris Jay Griston,
Attorneys for Petitioner.

SUBJECT INDEX.

	PAGE
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Statutes and Rules Involved	2
Summary Statement of Matter Involved	2
Specification of Errors	12
Reasons *Relied on* for Granting the Writ	14
A. The Circuit Court of Appeals, in holding that under Section 725 of the Probation Law, a court may not, by order, terminate the proceedings against a defendant and fully discharge him, has decided an important question of Federal Criminal Law and procedure in conflict with a decision of the Circuit Court of Appeals of the Fifth Circuit	14
B. The Circuit Court of Appeals, in holding that the Probation Act, Sections 724, 725, 18 U. S. C., provides for the execution of its provisions solely by the Court in which the defendant pleads guilty, or is convicted, and by no other Court or Judge, has decided an important question of Federal Criminal Law and procedure which has not been, but should be, settled by this Court, and which holding is probably in conflict with an applicable decision of this Court	16
C. Thet Circuit Court of Appeals, in holding that the visiting Judge, who had heard the case and imposed the probation, had no power and authority thereafter, by order made in chambers out of the district, to terminate the proceedings against the defendant, has decided an important question of Federal Criminal Law and procedure, which has not been and should be settled by this Court	18
D. The Circuit Court of Appeals, in holding that an order properly captioned in the proper district, properly entered and properly filed, and unvacated and unappealed from, may be treated as a nullity, has decided a question of Federal Criminal Procedure in conflict with the Circuit Court of Appeals for the 10th and 8th Circuits	20
E. The Circuit Court of Appeals, in holding that the question of venue was not waived, as to the order which was entered terminating the proceedings against the Defendant, decided a question of Federal Criminal Procedure, probably in conflict with an applicable decision of this Court	21
F. The Circuit Court of Appeals for the Second Circuit, in holding that the defendant may be now sentenced on two of three indictments on which a conditional probation was imposed, has decided an important question of Federal Criminal Law and procedure contrary to its own prior determination and that of the Circuit Court of the 10th Circuit	22

APPENDIX A.

PAGE

JUDICIAL CODE:

Section 22 25
Section 23 25
Section 481 25
Section 482 26
Section 483 26
Section 484 26
Section 485 27

PROBATION ACT:

Section 724 27
Section 725 28
Section 726 28
Section 727 29
Section 728 30
Section 557 30

APPENDIX B.

Opinion rendered herein by the Circuit Court of Appeals for the Second Circuit 31

Citations.

CASES:

Ackerson v. U. S., 15 F. (2) 268 ..... 17, 20
Apgar v. U. S., 255 F. 16 19
Burns v. U. S., 287 U. S. 216 ..... 17, 19
Clarke v. Chicago B. & O. Ry. Co., 62 F. (2) 440 20
Columbus Chain v. Standard Chain Co., 145 F. 186 21
Escoe v. Zerbst, 295 U. S. 490 ..... 16, 20
Evans v. District Judge, 12 F. (2) 64 20
Ex Parte Lang, 18 Wall 163 23
Freeman v. U. S., 227 F. 732 22
Gillespie v. Walker, 296 F. 330 23
Hicks v. U. S. Shipping Board, 14 F. (2) 316 19
In re De Bara, 179 U. S. 316 23
In re Henry, 123 U. S. 372 23
In re Parker, 131 U. S. 221 19
Janiole v. U. S., 58 F. (2) 115 ..... 18, 19
Kriebel v. U. S., 10 F. (2) 762 23
Panama Ry. Co. v. Johnson, 289 F. 964 Affd. 264 U. S. 375 21
Riggs v. U. S., 14 F. (2) 5 ..... 18, 22
Rosenwinkel v. Hall, 61 F. (2) 724 18

PAGE

Santos v. Esola, 50 F. (2) 516 23
State v. Lilioponlos, 165 Wash. 197, 5 Pac. (2) 319 23
The Alaska, 35 F. 555 21
U. S. v. Antinori, 59 F. (2) 171 ..... 15, 18, 19
U. S. v. Gargano, 25 F. (2) 723 ..... 19, 20
U. S. v. Goldstein, 271 F. 838 ..... 19, 21
U. S. v. Greenhaus, 85 F. (2) 116 ..... 22, 23
U. S. v. Lecato, 29 F. (2) 694 23
U. S. v. Maisel, 26 F. (2) 275 ..... 15, 17, 19
U. S. ex rel Mignozzi v. Day, 51 F. (2) 1019 22
U. S. v. Murray, 275 U. S. 347 23
Vimmick v. Tompkins, 194 U. S. 540 23
White v. Burke, 43 F. (2nd) 329 (C. C. A. 10, 1930) 23

Statutes.

Judiciary Code 240 (a) as amended by Act Feb. 13, 1925 (43 Stat. 93) 2

U. S. CODE:

Title 18 Section 557 ..... 2, 23
" 18 " 724 ..... 2, 12, 16, 17
" 18 " 725 ..... 2, 3, 7-10, 12-17, 21, 22
" 18 " 726 2
" 28 " 22 ..... 2, 9, 19
" 28 " 23 2
" 28 " 481 2
" 28 " 482 2
" 28 " 483 2
" 28 " 484 2
" 28 " 485 2

Miscellaneous.

23 Illinois Law Review 832 15
7 Texas Law Review 161 15
36 Op. Atty. Gen. 189, 190 23

IN THE

Supreme Court of the United States,

MAY TERM, 1937.

WILLIAM D. FRAD, *Petitioner,* against JOHN J. KELLY, United States Marshal for the Southern District of New York, UNITED STATES OF AMERICA.	No.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

May it please the Court:

The petitioner, William D. Frad, by Harris Jay Griston and Louis Karasik, his attorneys, prays for a Writ of Certiorari, to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, decided May 10, 1937, which

1. Reversed an order of the District Court of the Southern District of New York, which sustained a Writ of Habeas Corpus sued out by William Frad.

2. Reversed an order of the District Court, of the Southern District of New York, which denied the Government's motion for an order committing the above named defendant William Frad.

Opinions Below.

The District Court opinion (R. 129), is unreported. The Circuit Court of Appeals opinion has not yet been reported, but is annexed hereto in Appendix B, (*post*, p. 31).

Jurisdiction.

The jurisdiction of this Court is invoked under *Section 240 (a)* of the *Judiciary Code*, as amended by the Act of February 13, 1925 *(43 Stat. 938)*. The order for mandate of the Circuit Court of Appeals was entered May 17, 1937.

Statutes and Rules Involved.

The Statutes involved are *Title 18, U. S. Code, Sections 557, 724-726* (the Probation Act) and *Title 28, U. S. Code, Sections 22, 23, 481-485.*

Summary Statement of Matter Involved.

On March 21, 1934, the appellee, William D. Frad, came on for trial before Hon. Robert A. Inch, District Judge, and a jury, under three indictments, namely C 96-120, C 96-116 and C 80-944.

Before a jury was selected, he pleaded guilty to all three indictments. Sentence was deferred until the 26th of March, 1934.

Hon. Robert A. Inch is a District Judge of the Eastern District of New York, who had been temporarily assigned to the Southern District of New York for the March 1934 Term, after the termination of which term he returned to his home district.

The indictments were as follows:

Indictments C 96-116, charged him with conspiracy to violate Sections 211, 220 and 227, Title 22 U. S. Code under Section C 88 Title 18 U. S. Code (R. 9-14).

Indictment C 80-944, charged him in five counts with using passports obtained by false statements as to his identity (Sections 220, 221, Title 18, U. S. Code), (R. 4-8).

Indictment C 96-120, charged him in four counts with impersonation, by representing himself to be another person

when entering the United States (Section 220, Title 8, U. S. Code), (R. 15-20).

Under the first indictment, he was sentenced to two years imprisonment, and ordered to pay a $1,000 fine, for which he was to stand committed until paid (R. 14).

Under the last two indictments, the imposition of sentence was suspended, and the appellee was placed on probation for a period of four years, to begin after he had served the sentence of two years imposed under indictment C 96-116. (R. 8 and 19).

The appellee paid the fine of $1,000, and he was also committed to the Lewisburg Penitentiary, where he served his full sentence, with allowance off for good behavior, after which, he was discharged on November 2, 1935 (R. 68, 120).

The appellee then entered his term of probation under the other two indictments, and on November 15, 1935 signed the standing orders of the court as to probation (R. 25).

Subsequently, on December 13, 1935, an application was made to Judge Inch, the sentencing Judge, who was now sitting in his home District, in the Eastern District of New York, for an order discharging the appellee from probation, and terminating the proceedings against him, in accordance with the provision of the Probation Act, *Title 18; U. S. Code, Section 725.* Three days notice of that application was given to Hon. Fred E. Sweet, the Probation Officer of the Southern District of New York (R. 120, 83, 51, 29).

The hearing on that application was heard by Judge Inch in his Chambers in the Eastern District of New York (R. 51, 82, 83). At that hearing Probation Officer Sweet appeared, and opposed the motion *on the merits* (R. 51, 83).

After hearing argument of both sides, Judge Inch stated that the sentence which he had imposed on the first indictment on the plea of guilty was "quite stiff" (R. 91), and that for that reason he had not imposed any sentence on the other two indictments, but had deliberately suspended the imposition of sentence thereon (R. 57-58). He further stated, that, in view of the fact that the fine under that first indictment had been paid and the sentence thereunder

served, and in further view of the fact that medical proof submitted, both by doctors' statements and prison records, showed that the appellee was suffering from serious heart trouble, he would grant the motion.

Subsequently, on December 16, 1935, an order was signed by him providing as follows (R. 29):

> "ORDERED, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged rfom further supervision and the proceedings against him in this cause be, and the same are hereby terminated."

That order was captioned (R. 28):

"UNITED STATES DISTRICT COURT

Southern District of New York."

Furthermore, that order, so captioned, was entered in the Southern District of New York, was filed in the Southern District of New York, and is still on file in the Southern District of New York; all as required by law (R. 107).

Subsequently, on a petition made against appellee by Probation Officer Sweet (R. 33), based on a complaint against appellee, filed by a special investigator, charging defendant with alleged larceny on the high seas (R. 30), an order was signed by Judge Caffey of the Southern District of New York, under date of November 20, 1936, for the issuance of a warrant to apprehend the appellee for alleged violation of one of the terms of his probation (R. 32). He was arrested and bailed pending a hearing. *The petition failed to mention Judge Inch's order of December 16, 1935,* even though Probation Officer Sweet knew about it, having opposed the granting of that order. Judge Caffey does not appear to have had any knowledge of the December 16th order, when he granted his order for a warrant.

On December 1, 1936, a motion was made by the District Attorney of the Southern District of New York returnable December 8, 1936, for an order to re-settle the order of Judge Inch dated December 16, 1935.

It is to be observed that, though the notice of motion states that the motion is for an order "to set aside" (R. 35) the December 16th order of Judge Inch, that phrase must be read together with the prayer for relief in the motion itself, which merely asks for *a re-settlement and modification* of that order, and

> "that so much of the order of December 16, 1935 that purports to do more than discharge the defendant from probation supervision be set aside and a new order entered in this cause" (R. 39).

On the hearing of that motion, the District Attorney specifically moved *to re-settle* the order, and did *not* seek to have it vacated (R. 59).

That motion was heard by Judge Inch, the sentencing Judge, who then again sat and held court in the Southern District of New York (R. 42). He decided, after hearing both sides *on the merits,* that he would grant *a re-settlement* of the order, so as to insert the word "probation" into that part of the order which reads:

> "* * * and the proceedings against him under this cause, be and the same hereby are terminated",

so that it would read,

> "* * * and the *probation* proceedings against him under this cause, be and the same hereby are teminated" (R. 65).

The defendant (petitioner herein) took the position then, that the order could not be re-settled at this late date. Thereupon the District Attorney stated that he would "hold up the entering of the order" of resettlement, "until such time as we find it necessary" (R. 65), and not to do so, anyhow, until after the court had disposed of the Writ of Habeas Corpus (R. 63).

So that the validity of Judge Inch's order of December 16, 1935, as an order in this proceeding, was recognized by the District Attorney of the Southern District of New York.

No order of resettlement was ever entered, so that the rights of the defendant on the Writ of Habeas Corpus, subsequently sued out by defendant, must be decided by the order as it stands of record, entered and on file with the Clerk of the Southern District of New York.

On or about the 3rd of December, 1936, the Government gave notice to the defendant, and to his surety, that the indictments against him under C 96-120 and C 80-944 would be brought on for sentence on December 8, 1936 (R. 40, 41). But that notice was not pressed, and no application to sentence was ever made.

Then, on December 4, 1936, the defendant surrendered to the Marshall, under the order of Judge Caffey of November 20, 1936, charging the defendant with probation violation, and sued out a Writ of Habeas Corpus (R. 73), *on the ground that he could not be guilty of any probation violation, in view of Judge Inch's order of December 16, 1935, which had discharged him from probation, and which had also "terminated" "the proceedings" against him* (R. 66-71). The return to that Writ was filed by John J. Kelly, Probation Officer, under date of December 8, 1936. A traverse to the return was filed by the defendant under date of December 10, 1936. Argument on the Writ came on before Judge Bondy on December 21, 1936 (R. 80).

The next day, the 22nd of December 1936, the United States Attorney served a notice of motion, returnable December 28, 1936, wherein he made the following prayer for relief, in regard to indictments C 96-120 and C 80-944 (R. 121).

> "WHEREFORE, deponent prays that an order issue committing this defendant for the period of the *unserved portion* of his sentence of March 26, 1934, *to wit, four years* in a place to be designated by the Attorney General of the United States, and for such other, further and different relief as to the court may seem just and proper." (Italics ours.)

With regard to this motion to commit, it should be observed that *there had been no sentence imposed on these two indictments*, but that, on the contrary, *"the imposition* of sentence" had been suspended. So that no motion for an order to designate a place of incarceration for the purported *"unserved* portion of his sentence of March 26, 1934, to wit, four years," would lie, and that motion was properly denied by the District Court (R. 132). *That is one of the orders involved on this appeal.*

In regard to the Writ of Habeas Corpus, the District Court held that, under *Title 18, U. S. C. Section 725,* the court could discharge the probationer not merely from further supervision, but could also terminate the proceedings against him in their entirety and give the defendant a full and complete discharge. Under that law, the order of Judge Inch of December 16, 1935 completely discharged the defendant, so that he was no longer amenable to any supervisory process of the courts in relation to those two indictments.

The District Court further held that, if the principle of *U. S.* v. *Greenhaus,* 85 Fed. 2, 116 (C. C. A. 2) applied to this case, (on the ground that the sentences on all three indictments could be considered a single sentence, as they were heard and disposed of simultaneously, and that therefore the suspension of imposition of sentence and granting of (probation on the last two indictments was illegal, in that it was coupled with a sentence for a prison term), the illegal provisions may be treated as a nullity. The District Court further held that no new sentence could now be imposed, as the term of court, within which to resentence, had long expired, because a valid sentence was imposed with reference to all indictments, in that a valid sentence was imposed as to the first indictment, which sentence had been served and the fine paid by the defendant. In other words, if all three indictments are to be deemed a consolidated indictment, only one sentence could be imposed, and no re-sentence could be given after the sentence imposed had been served, and fine paid, even though part of the sentence then given may have been void.

The District Judge, thereupon, held that the Government's motion to revoke the defendant's suspension of imposition of sentence, on the ground of violation of probation, should be denied, and it sustained the Writ of Habeas Corpus (R. 134. *That is the other order involved on this appeal.*

The Government appealed from those two orders, both of which were reversed by the Circuit Court of Appeals.

The Circuit Court of Appeals ruled that if the principle of the *Greenhaus* case applied, "the suspension (of sentence on the two indictments) could be vacated and execution of the sentence ordered". As has already been observed, however, *no sentence was imposed* on either of the two indictments in question. So that *no execution* of sentence was suspended, but the *imposition* of sentence itself had been suspended. Therefore, if the suspension of imposition of sentence was void, and the *Greenhaus* case principle applies, (in that all three indictments are to be deemed consolidated into one), there is *not* any valid portion of the sentence open on which execution could be ordered.

On the other hand, if the principle of the *Greenhaus* case does not apply, then the suspension of imposition of sentence thereon and the granting of probation was proper, because each of the three indictments was then on a separate footing, and each was entitled to a separate disposition. In that event, the subsequently granted order of Judge Inch of December 16, 1935, which was in accordance with *Section 725,* resulted in a full discharge of the defendant, as if he had served a sentence.

But the Circuit Court of Appeals held that the December 16th, 1935 order of the sentencing Judge, did not have such effect for two reasons.

First, the Circuit Court of Appeals held, that order was void because of lack of jurisdiction in Judge Inch to grant that order after he had returned to his home district.

But the Eastern District Judge, who had heard the proceeding in the Southern District as a duly assigned Judge, and who had suspended the imposition of sentence on those

two indictments, and granted probation thereon, would appear to have had continuing power in regard to probation. This is a dual power he has, namely (a) under *Section 22* of the Judiciary Code, and (b) under the very nature of probation itself, which is a continuing matter.

Furthermore, he had the power to pass upon the application to terminate the probation and the proceedings, even though he was then sitting in the Eastern District, because *Section 725* does *not* specify the court or Judge who may pass upon that application (except in one specific instance, not here involved), and leaves it open, so that the circumstances can shape their own remedy, and tribunal.

What is more, the application for such relief under probation may be granted in Chambers, for all proceedings in probation may be, and should be informal, and a Chambers hearing need not be in the original district.

It may be true that the sentencing Judge was not, on December 13, 1935, sitting as a judge of the Court of the Southern District in the Southern District of New York, but he was a Judge of the Court, and was sitting in Chambers in the Eastern District, and passing on this matter which pertained to the Southern District, upon the tacit consent of the Probation Officer of the Southern District. His order is therefore good.

If, however, there was any venue question, it may be waived, and was waived by the Government on two occasions. The application for the December 16th order was opposed by the Probation Officer of the Southern District, *on the merits*, without raising any question of venue. An order was properly made, after argument, properly captioned, properly entered, and properly filed *in the Southern District*, and no application to vacate was pressed, and no appeal was taken from that order. Furthermore, its validity was recognized by the District Attorney of the Southern District of New York on his application for re-settlement of that very order, especially when he said he would let that order stand until after the Habeas Corpus application was disposed of.

So that the Circuit Court of Appeals was in error in holding that this order of December 16th was void for lack of jurisdiction.

Secondly, the Circuit Court of Appeals held that, in any event, even if the order were valid, an order terminating the probationary supervision merely terminates the power of supervision over the defendant exercised by the Probation Officer, but not the general supervisory power of the Courts over him granted to the courts by *Section 725,* until the longest term for which the defendant could be sentenced has expired. This may be the limited effect of an order which merely discharges the defendant from probationary supervision, but the order here went further, and did not merely terminate the probationary supervision of the Probation Officer, but it also "terminated " *the proceedings*," as is expressly allowed by *Section 725.* This terminated everything, and constituted a full discharge of the defendant.

Therefore, Judge Caffey's order for a warrant charging the defendant with alleged violation of probation under those two indictments was improperly granted in that there was no proceeding against him then open, in which probation could be violated by him, and the Writ of Habeas Corpus was correctly sustained in the District Court, and was erroneously reversed by the Circuit Court of Appeals.

The principal questions presented, therefore, are as follows:

1. Under U. S. Code, Title 18, Section 725, may either a court or Judge terminate the proceedings against the defendant, so as to thereafter relieve him of not merely supervisory probation, but from every and all possible forms of probation or sentence, and fully discharge him, as if he had fully performed under a sentence?

2. Can any court or Judge grant that relief, regardless of whether he sits in the District where the case was tried, or in another district?

3. Does the Judge, who sat on the case, and imposed the probation and suspended the imposition of sentence, have continuing power to pass on the question of whether the defendant should be fully discharged?

4. Where a visiting Judge has heard the case and imposed the probation and suspended the imposition of sentence, may he thereafter, subsequent to the termination of the term, entertain a motion to discharge the defendant and grant such application?

5. May the question of venue, as to whether a former visiting Judge, now in his home district, may hear the motion to dicharge the defendant, be waived by the Government?

6. Where three indictments are brought on for trial on the same date, and the defendant pleads guilty to all three indictments, may the court impose a term of two years and $1,000 fine on one indictment and at the same time suspend the imposition of sentence under each of the other indictments, and grant probation for four years to begin after serving the sentence on the first indictment?

7. Where a visiting Judge from the Eastern District of New York, while sitting in the Southern District of New York hears three criminal cases in which defendant pleaded guilty, imposes sentence in one and grants probation, and suspends the imposition of sentence on the other two, and returns to his home district, and where thereafter a motion is made returnable before that Judge in his home district, upon notice duly given to the Probation Officer of the Southern District, and where that Probation Officer appears before the Judge on the return date at Chambers and opposed the said motion, and where the said Judge after deliberation grants the motion discharging the defendant, and where thereafter an order is signed by said Judge, sitting in his Chambers in the Eastern District, captioned in the Southern District, and thereafter a motion is made by the District Attorney of the Southern District to modify said order, and said motion is argued in the Southern District of New York before the sentencing judge, who is again sitting there, and is argued on the merits and granted, but no order is entered and the District Attorney says he will let the order stand until he decides to avail himself of the privilege granted to re-settle, is the defendant amenable in those proceedings to further control by the court, for alleged acts of violation of probation occurring subsequent to the date of the entry of the discharge order?

Specifications of Errors.

1. The Circuit Court of Appeals erred in holding that if the three indictments here, to which the defendant pleaded guilty at the same time could be treated as if they were several counts in a single consolidated indictment, that the suspension of the imposition of sentence on two of the three indictments could be vacated and execution of sentence ordered, even though the sentence on the third indictment had been served.

2. The Circuit Court of Appeals erred in holding that the Probation Act, Sections 724, 725, Title 18 U. S. C. provides for the execution of its provisions solely by the court in which the defendant pleads guilty or is convicted.

3. The Circuit Court of Appeals erred in holding that neither the United States Attorney for the Southern District, nor the Probation Officer of the Southern District, had any jurisdiction to act for the United States in the Eastern District of New York, in regard to *Sections 724* and *725* of *Title 18 U. S. C.*

4. The Circuit Court of Appeals erred in holding that a District Judge, ordered by a senior Circuit Court Judge to hold court in another district, is not empowered to sign an order in a case pending in such other district, when absent therefrom and sitting in another district.

5. The Circuit Court of Appeals erred in holding that the order of the sentencing Judge, which terminated the appellee's probation and terminated the proceedings against the appellee, was void for lack of jurisdiction, because granted by him at Chambers when he was back in his home district after his visiting term was over.

6. The Circuit Court of Appeals erred in holding that the sentencing Judge, who had been a visiting Judge at the time

of sentence, and who was sitting in his home district when he entertained the application and decided the matter pertaining to probation which he had imposed, had no jurisdiction to pass upon that application.

7. The Circuit Court of Appeals erred in holding that the Government properly moved to revoke the probation and to sentence the appellee upon the second and third indictments, even though an order had been entered prior thereto terminating the proceedings against him.

8. The Circuit Court of Appeals erred in reversing the order entered in the District Court, which denied the Government's motion for an order committing the appellee to a penitentiary to be designated by the Attorney General of the United States, wherein the defendant should serve an "unserved portion" of a four year sentence under indictments C 96-120 and C 80-944.

9. The Circuit Court of Appeals erred in reversing an order of the District Court, which sustained a Writ of Habeas Corpus, granted to the appellee, who had theretofore been arrested under a warrant issued pursuant to an order of arrest of the appellee, for alleged violation of the terms of his probation.

10. The Circuit Court of Appeals erred in holding that under *Section 725*, the appellee could not be fully discharged and the proceedings against him fully terminated.

Reasons Relied on for Granting the Writ.

A.

The Circuit Court of Appeals, in holding that under *Section 725* of the *Probation Law*, a court may not, by order, terminate the proceedings against a defendant and fully discharge him, has decided an important question of Federal Criminal Law and procedure in conflict with a decision of the Circuit Court of Appeals of the Fifth Circuit.

Under *Section 725*, two types of probation are created, namely (a) *sentence probation* under which the defendant is subject to probate supervision by Probation Officers during the time fixed by the sentencing judge for probation, when the imposition of sentence itself is suspended, or execution is suspended on a sentence imposed, and (b) *statutory probation* under which the court has power, *after* sentence probation is ended, but within the maximum period for which the defendant might originally have been sentenced, to have him brought in and to then impose such sentence as might originally have been imposed upon the defendant.

That section further gives the court the power to have the probationer brought in at any time while he is on probation, to investigate the facts of his probation and then the section says:

> "* * * The court may thereupon discharge the probationer from further supervision *and may terminate the proceedings against him*, or may extend the probation, as shall seem advisable."

In the decision appealed from, the Circuit Court of Appeals for the second circuit has held that the Language of *Section 725*, which permits the court "to terminate the proceedings against" the defendant, does not give power to fully discharge the defendant, but merely to terminate the sentence probation, namely the supervisory probation by Probation Officers.

The contrary, however, has been held by the Circuit Court of Appeals for the Fifth Circuit in *U. S.* v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5, 1932). The court there made a lengthy and careful study *of Section 725*, pointed out that the Probation Act was remedial, and then made this significant observation (p. 172):

> "* * *the law is designed to vest the *trial judges* with discretion * * * the act gives the trial court authority to suspend either the imposition or execution of sentence and to place the defendant upon probation upon conditions. If in a shorter time than provided by the order, it should appear that the defendant has rehabilitated himself and become a useful citizen, *the court may terminate its proceedings against him.*" (Italics ours.)

Then comes a further even more significant, part of the opinion, for the court then says (p. 172):

> "Suspension of sentence * * * implies that the jurisdiction of the court over the case and over the defendant is continued until the suspension of sentence is terminated, either by the *final discharge* of the defendant or by the imposition of sentence." (Italics ours.)

That principle has been squarely applied and a full discharge granted in *United States* v. *Maisel*, 26 F. (2) 275 (D. C., S. D., Texas, 1928), which case has been discussed with approval in *23 Illinois Law Review 832* and *7 Texas Law Review 161.*

The point does not appear to have been passed upon by this court.

B.

The Circuit Court of Appeals, in holding that the Probation Act, *Sections 724, 725, 18 U. S. C.* provides for the execution of its provisions solely by the Court in which the defendant pleads guilty, or is convicted, and by no other Court or Judge, has decided an important question of Federal Criminal Law and procedure, which has not been, but should be, settled by this Court, and which holding is probably in conflict with an applicable decision of this Court.

Section 725 has two distinct sets of provisions relating to two distinct types of judicial acts, to be performed: (a) provisions giving the court power to *discharge* the probationer from further probation supervision and to *'terminate* the proceedings against him" or to extend the probation, and (b) provisions giving the court power to *revoke* probation and to *revoke* the suspension of sentence and to impose such sentence as might originally have been imposed.

The section does *not* designate the court which may hear the application relating to *discharge* of the probationer and *termination* of the proceedings. *That has been left open.*

In regard to revocation, however, the section makes a distinction between probationers who are arrested by warrant for probation violation, and those who are arrested without a warrant, and specifies that probation violators, *who are arrested by warrant,* should be taken before the court which issued the warrant, and still further provides that the warrant is to be issued only out of the sentencing court (*Escoe* v. *Zerbst,* 295 U. S. 490). The section, however, does *not* specify the court to which a probation violator shall be taken, when he has been arrested *without a warrant,* though it does provide that he may be arrested without a warrant *"wherever found".*

It is, therefor, significant to observe, that the specific court that may hear the application has been named only for one set of circumstances, and has been left open as to

all other provisions in the section. This flexibility of the section, as to all other provisions thereunder, has been recognized by the Circuit Court of Appeals for the Second Circuit itself.

In *Ackerson* v. *U. S.* 15 F. (2) 268 (C. C. A. 2, 1926), the court said per *Hough, J.* (p. 270):

> "* * * there is nothing specifically said in the statute (referring to Section 724 and 725 of Title 18, U. S. C.) to prevent a convict from selecting some particular judge before whom to prefer his appeal for mercy * * * and much less does the statute in terms cover cases (such as are shown above) of death or *removal* (of the trial judge) *from district.*" (Italics ours.)

In *Burns* v. *U. S.*, 287 U. S. 216, this court said (p. 220):

> "To accomplish the purpose of the statute, an *exceptional degree of flexibility in administration is essential. It is necessary to individualize each case,* to give that careful, humane and comprehensive consideration to the particular situation of each offender which would be possible only in the exercise of a broad discretion." (Italics ours.)

See also

> *U. S.* v. *Maisel,* 26 F. (2) 275 (D. C. S. D. Texas 1928).

In the *Ackerson* case the question presented was whether a District Judge had the power to entertain an application to terminate probation supervision and the court held he did. It did not then decide that a visiting Judge who had tried the case and who had left the District did not also have such power.

It would appear that the section was loosely framed by design, in order to let the facts of each case shape their own remedy and to permit the most available and most desirable court pass upon the question of probation, depending up the place where the probationer is at the time that the problem is presented.

The Trial Judge appears to be the most desirable person to pass upon such applications, in view of his contact with the case itself.

U. S. v. *Antinori,* 59 Fed. (2d) 171 (C. C. A. 5, 1932).

In *Jianole* v. *U. S.,* 58 F. (2) 115 (C. C. A. 8, 1932), the court said, per *Van Valkenburgh, Ch. J.* (p. 117):

> "Everything points to the purpose of the Congress to lodge a very broad discretion in the *trial judge* in the granting *and revoking* of probation. To require formal proceedings would be subversive of the very purpose of the act." (Italics ours.)

In *Rosenwinkel* v. *Hall,* 61 F. (2) 724, (C. C. A. 7, 1932), the court said (p. 726):

> "Its object being human and benevolent, the statute (the Probation Act) should be given a broad interpretation."

In *Riggs* v. *U. S.,* 14 F. (2) 5, (C. C. A. 4, 1926) Certiorari denied 273 U. S. 719, the court said, per *Waddill, J.* (p. 9):

> "In the enforcement of this action much latitude must be allowed to the district judges, in affording the defendant the benefits thereof. Hence the ordinary rules regarding terms of court, cannot be adhered to strictly."

C.

The Circuit Court of Appeals, in holding that the visiting Judge, who had heard the case and imposed the probation, had no power and authority thereafter, by order made in chambers out of the district, to terminate the proceedings against the defendant, has decided an important question of Federal Criminal Law and procedure, which has not been and should be settled by this Court.

As probation is informal, orders effecting it may properly be made at Chambers. So that the order here, made at Chambers, though out of the District, is a valid order.

In re Parker, 131 U. S. 221;
U. S. v. *Goldstein*, 271 F. 838 (C. C. A. 8, 1931);
Jianole v. *U. S.*, 58 F. (2) 115 (C. C. A. 8, 1932);
Apgar v. *U. S.*, 255 F. 16.

In the *Apgar* case, *supra*, the court said (p. 18).

> "Where the order is one which may be made at the Chambers of the Judge, it is not necessary that it be within the territorial limits of the district where the order is to be effective, if it is made where the Judge at the time is performing the duties of his office."

Especially is this so under *Title 28, U. S. C., Section 22*, which gives a visiting Judge, after he has returned to his own District, "the power to decide *all matters* which have been submitted to him within such district". *Section 23* is supplemental to *Section 22*.

That the provisions of *Section 22* apply to visiting Judges is settled.

Hicks v. *U. S. Shipping Board*, 14 F. (2) 316 (1926).

Probation is, by its very nature, a continuing matter.

Burns v. *U. S.*, 287, U. S. 219 (1932);
U. S. v. *Antinori*, 59 F. (2d) 171 (C. C. A. 5, 1932).

The probation proceeding, under the Probation Act, is something separate and apart from the criminal proceeding (See *U. S.* v. *Gargano*, 25 F. (2) 723, p. 724). Probation would appear to be a matter which was submitted to the trial judge at the time he imposed probation when the defendant came up for sentence. See *U. S.* v. *Maisel*, 59 F. (2) 172, and *Jianole* v. *U. S.*, 58 F. (2) 115 (C. C. A. 8, 1932).

It would appear to be the intent of Congress to permit the sentencing Judge to have power over the probationer even though another Judge may also have concurrent power. The

facts are permitted to shape their own remedy within the benevolent purpose of the Probation Act.

This court has held in *Escoe* v. *Zerbst,* 295 U. S. 490, that revocation of probation "is not a trial in any strict or formal sense" (p. 493).

In *Evans* v. *District Judge,* 12 F. (2) 64, p. 65 (C. C. A. 6, 1926), it was expressly said that probation matters should not be "the subject of formal applications, hearings and orders."

It has also been declared that the duties imposed by the Probation Act on a judge are *sui generis;* that his functioning as a judge or court in such a proceeding is as judge or court in name only; that the essence of his duties under the Probation Act may well have been vested in some "executive officer, board, bureau or commission"; and that the duties under the Probation Act must be distinguished from the judicial functions of the Judge or Court under the Criminal Statutes under which sentence is imposed. *U. S.* v. *Gargano,* 25 F. (2) 723, p. 724.

Indeed, it has been observed in the *Ackerson* case, *supra,* that the Probation Statute was so loosely framed, that even the nature of probation itself was left vague, saying (p. 269):

> "We do not express any opinion on the meaning or effect of the phrase 'place on probation'; but probation, whatever it means, is part of the jurisdictional grant."

D.

The Circuit Court of Appeals, in holding that an order properly captioned in the proper district, properly entered and properly filed, and unvacated and unappealed from, may be treated as a nullity, has decided a question of Federal Criminal Procedure in conflict with the Circuit Court of Appeals for the 10th and 8th Circuits.

In *Clarke* v. *Chicago B. & Q. Ry. Co.,* 62 F. (2) 440, 441 (C. C. A. 10th), where a visiting judge signed an order in an

action, after he had returned to his own district, which order was captioned and entered in the original district, it was contested for lack of jurisdiction of the judge, and the court held:

> "The presumption is that the order was regularly and legally made (The Alaska)."

To like effect see

U. S. vs *Goldstein*, 271 Fed. 838 (C. C. A. 8, 1931);
The Alaska, 35 F. 555 (C. C. S. D.);
Columbus Chain v. *Standard Chain Co.*, 145 F. 186.

E.

The Circuit Court of Appeals, in holding that the question of venue was not waived, as to the order which was entered terminating the proceedings against the Defendant, decided a question of Federal Criminal Procedure, probably in conflict with an applicable decision of this Court.

This court has held that the question of venue may be waived even to institute an action.

Panama Ry. Co. v. *Johnson*, 289 F. 964, Judg. Aff'd. 264 U. S. 375.

Under *Section 725*, the only person who needs to be notified about the application for discharge of defendant and termination of the proceedings is the proper probation officer. Here the probation officer for the Southern District of New York was notified, and he appeared on the hearing and opposed the application on the merits. Thereafter, the District Attorney for Southern District of New York moved for resettlement of that order, and that motion wase heard by the same judge, then again sitting in the Southern District and that motion was argued *on the merits*, and the validity of the order, as a

proper order, was accepted by the District Attorney, who said he would not even resettle the order, "until such time as we find it necessary".

As *Section 725 does not* specify the court that may hear *applications* for the *discharge* of the probation and for *termination* of proceedings against him, if any question of venue existed, it was waived first by the probation officer and next by the District Attorney.

F.

The Circuit Court of Appeals for the Second Circuit, in holding that the defendant may be now sentenced on two of three indictments on which a conditional probation was imposed, has decided an important question of Federal Criminal Law and procedure contrary to its own prior determination and that of the Circuit Court of the 10th Circuit.

The Circuit Court of Appeals is in error in distinguishing the instant case from *United States* v. *Greenhaus,* 85 F. (2d) 116 (C. C. A. 2, 1936). In *United States* v. *Greenhaus, supra,* cert. den. November 17, 1936, the Circuit Court held that where there are sentences upon several counts in a single indictment, the suspension of a sentence to begin at termination of a prior one is unlawful, and hence an order of probation is invalid and execution of the sentence may be ordered. The opinion in the case at bar, decided May 10, 1937, held that "that rule does not apply to indictments which are separate and not consolidated", and the defendant was remanded for the consideration of the revocation of his probation and for sentence under the Probation Act (§725 Title 18 U. S. C.).

The distinction made between counts in a single indictment in *United States* v. *Greenhaus, supra,* and separate indictments in the instant case is not supported by the weight of authority. *Riggs* v. *United States,* 14 F. (2d) 5 (C. C. A. 4, 1926); *Freeman* v. *United States,* 227 Fed. 732, 740 (C. C. A. 2, 1915); *United States ex rel. Mignozzi* v. *Day,* 51

F. (2d) 1019 (C. C. A. 2, 1931); *Gillespie* v. *Walker*, 296 Fed. 330 (C. C. A. 4, 1924); Cf. *Vimmick* v. *Tompkins*, 194 U. S. 540; *In re De Bara*, 179 U. S. 316; *In re Henry*, 123 U. S. 372.

The three indictments here to which pleas of guilty were entered simultaneously arose out of the same series of transactions. They could have been consolidated under Section 557 of Title 18 U. S. C.

Under the second opinion of *United States* v. *Greenhaus*, decided April 20, 1937, the Court is limited to recommitting the defendant to serve the sentence originally imposed. In the case at bar no sentence had been imposed on March 26, 1934 on two of the indictments,* and a proper sentence of two years and a fine of $1,000. was imposed on C 96-16. Therefore, the complete sentence imposed on that date was served, and it is now too late for the government to say that sentence should be changed after it has exacted the full penalties thereon from the defendant.

Furthermore, the sentence cannot be changed after the term in which it has been imposed has expired. *Santos* v. *Esola*, 50 F. (2d) 516; *Gillespie* v. *Walker*, *supra*, *Ex parte Lang*, 18 Wall 163, 167 (1873).

This decision is in direct conflict with an opinion of the 10th Circuit; *White* v. *Burke*, 43 F. (2d) 329 (C. C. A. 10, 1930), which held that the District Court is without power to suspend a part of a sentence on the condition that defendant serve another part thereof.

WHEREFORE, the petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals

---

* The difference in effect between the suspension of imposition of sentence and of suspension of execution on a sentence imposed is well settled, *United States* v. *Murray*, 275 U. S. 347; *Kriebel* v. *United States*, 10 F. (2d) 762; *United States* v. *Lecato*, 29 F. (2d) 694; 36 Op. Atty Gen., 189, 190; *State* v. *Liliopoulos*, 165 Wash. 197, 5 Pac. (2d) 319.

for the Second Circuit, commanding that Court to certify and to send to this court, for its review and determination on a day certain to be therein named, the full and complete transcript of the record and proceedings in the case entitled on its docket "UNITED STATES CIRCUIT COURT OF APPEALS, For the Second Circuit, JOHN J. KELLY, United States Marshal for the Southern District of New York, Respondent-Appellant, against UNITED STATES OF AMERICA, ex rel., WILLIAM FRAD, Relator-Appellee," and that said orders of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and your petitioner may have such other, further and different relief in the premises as to this Honorable Court may seem meet, just and proper; and your petitioner will ever pray.

May 21, 1937.

WILLIAM D. FRAD,
By Louis Karasik
and Harris Jay Griston,
Attorneys for Petitioner.

APPENDIX A.

Title 28 U. S. C. *Judicial Code, Section 22,* provides as follows:

> "*Any designated and assigned judge* who has held court in another district than his own shall have power, notwithstanding his absence from such district and the expiration of the time limit in his designation, *to decide all matters which have been submitted to him within such district,* to decide motions for new trials, settle bills of exceptions, certify or authenticate narratives of testimony, or perform any other act required by law or the rules to be performed in order to prepare any case so tried by him for review in an appellate court; and his action thereon in writing filed with the clerk of the court where the trial or hearing was had shall be as valid as if such action had been taken by him within that district and within the period of his designation Mar. 3, 1911, c. 231 §18, 36 Stat. 1089; Oct. 3, 1913, c. 18, 38 Stat. 203; Sept. 14, 1922, c. 306; §5, 42 Stat. 839)." (Italics ours.)

Title 28 U. S. C. *Judicial Code, Section 23,* provides as follows:

> "*Same; duty of district or circuit judges.* It shall be the duty of the district or circuit judge who is designated and appointed under either of sections 17 to 22 or this title, to discharge all the judicial duties for which he is so appointed, during the time for which he is so appointed; and all the acts and proceedings in the courts held by him, or by or before him, in pursuance of said provisions, shall have the same effect and validity as if done by or before the district judge of the said district. (R. S. §595; March 3, 1911, c. 231, §19, 36 Stat. 1090.)"

Title 28, U. S. C. *Judicial Code Section 481-485, provides as follows:*

> Sec. 481. *District Attorneys*—There shall be appointed in each district, including the District of Columbia, a

person learned in the law, to act as attorney for the United States in such district. (R. S. Sec. 767; June 26, 1876, c. 147, Sec. 1, 4, 19 Stat. 61, 62; Feb. 24, 1879, c. 97, Sec. 8, 20 Stat. 320; Mar. 3, 1881, c. 144, Sec. 7, 21 Stat. 507; April 25, 1882, c. 87, Sec. 1, 3, 22 Stat. 47; July 20, 1882, c. 512, Sec. 3, 22 Stat. 172; Aug. 5, 1886, c. 928, Sec. 7, 24 Stat. 309; Feb. 22, 1889, c. 180, Sec. 21, 25 Stat. 682; July 3, 1890, c. 656, Sec. 16, 26 Stat. 217; July 10, 1890, c. 664, Sec. 16, 26 Stat. 225; Mar. 3, 1893, c. 220, 27 Stat. 745; July 16, 1894, c. 138, Sec. 14, 16, 28 Stat. 110, 111; June 24, 1898, c. 495, Sec. 1, 30 Stat. 487; May 12, 1900, c. 391, Sec. 9, 31 Stat. 176; Jan. 22, 1901, c. 105, Sec. 4, 7, 31 Stat. 736, 737; Feb. 12, 1901, c. 355, Sec. 5, 7, 31 Stat. 782; Mar. 2, 1901, c. 801, Sec. 3, 5, 31 Stat. 881; Mar. 11, 1902, c. 183, Sec. 5, 6, 32 Stat. 66; Mar. 2, 1905, c. 1305, Sec. 4, 6, 33 Stat. 824, Mar. 3, 1905, c. 1427, Sec. 13, 15, 19, 33 Stat. 995, 996; June 16, 1906, c. 3335, Sec. 13, 34 Stat. 275; Mar. 3, 1915, c. 100, Sec. 3, 4, 38 Stat. 961.)

Sec. 482. *Same; term and oath.*—District attorneys, including the District of Columbia, shall be appointed and commissioned for a term of four years, and shall continue to discharge the duties of their respective offices, unless sooner removed by the President, until their successors shall be appointed and qualify in their stead. Every district attorney, before entering upon his office shall be sworn to a faithful execution thereof. (R. S. Sec. 769; June 24, 1898, c. 495, Sec. 1, 30 Stat. 487.)

Sec. 483. *Assistant district attorneys; official residence.*—Except as provided in section 591 of this title, whenever, in the opinion of the district judge of any district, including the District of Columbia, evidenced by writing, the public interest requires it, one or more assistant district attorneys may be appointed, by the Attorney General; but such opinion shall state to the Attorney General the facts as distinguished from conclusions, showing the necessity therefor (May 28, 1896, c. 252, Sec. 8, 29 Stat. 181; July 19, 1919, c. 24, Sec. 1, 41 Stat. 209.)

Sec. 484. *Clerical assistance; salaries*—Except as provided by section 591 of this title, the district attorney

of any judicial district, including the district attorney for the District of Columbia, when the facts showing the necessity therefor are certified by the district judge to the Attorney General, may with the approval of the Attorney General, and no longer than such approval lasts, employ necessary clerical assistance at such salary or salaries as shall be from time to time fixed by the Attorney General (May 28, 1896, c. 252, Sec. 15, 29 Stat. 183; July 19, 1919, c. 24 Sec. 1, 41 Stat. 209.)

Sec. 485. District attorneys; duties—It shall be the duty of every district attorney to prosecute, in his district, all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States are concerned, and, unless otherwise instructed by the Secretary of the Treasury, to appear in behalf of the defendants in all suits or proceedings pending in his district against collectors, or other officers of the revenue, for any act done by them or for the recovery of any money exacted by or paid to such officers, and by them paid into the Treasury (R. S. Sec. 771).

Probation Act. (Act March 4, 1925, c. 521, as Amended June 6, 1930, c. 406 and June 16, 1933, c. 97; U. S. C. Title 18, Secs. 724-725).

Sec. 724: *Suspension of imposition or execution of sentences and placing of defendant upon probation; power of courts; revocation or modification of probation; duties of probationer.* The courts of the United States having original jurisdiction of criminal actions, except in the District Court of Columbia, when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or mod-

ify any condition of probation, or may change the period of probation. The period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

Sec. 725. *Same; powers of probation officers; arrest of probationer.* When directed by the court, the probation officer shall report to the court, with a statement of thec onduct of the probationer while on probation. The Court may thereupon discharge the probationer from further supervision and may terminate ment of the conduct of the probationer while on probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a warrant, or the court which has granted the probation may issue a warrant for his arrest which warrant may be executed by either the probation officer or the United States marshal of either the district in which the probationer was put upon probation or of any district in which the probationer shall be found and, if the probationer shall be so arrested in a district other than that in which he has been put upon probation, any of said officers may return probationer to the district out of which such warrant shall have been issued. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

Sec. 726. *Same; probation officers; appointment, etc.*—The judge of any United States court having orig-

inal jurisdiction of criminal actions, except in the District of Columbia, may appoint one or more suitable persons to serve as probation officers within the jurisdiction and under the discretion of the judge making such appointment or of his successor. All such probation officers shall serve without compensation except that in case it shall appear to any such judge that the needs of the service require that there should be a salaried probation officer, such judge may appoint one such officer and shall fix the salary of such officer subject to the approval of the Attorney General in each case. Probation officers who are to receive salaries shall be appointed after competitive examination held in accordance with the laws and regulations of the civil service of the United States. Such judge may in his discretion remove any probation officer serving in his court. The appointment of probation officers shall be in writing and shall be entered on the records of the court of the judge making such appointment, and a copy of the order of appointment shall be delivered to the officer so appointed. Such court may allow any probation officer his actual expenses necessarily incurred in the performance of his duties. Such salary and expenses when duly approved shall be paid from the appropriations for courts in which such officer serves. (Mar. 4, 1925, c. 521, sec. 3, 43 Stat. 1260.)

Sec. 727. *Same; duties of probation officers.*—It shall be the duty of a probation officer to investigate any case referred to him for investigation by the court in which he is serving and to report thereon to the court. The probation officer shall furnish to each person released on probation under his supervision a written statement of the conditions of probation and shall instruct him regarding the same. Such officer shall keep informed concerning the conduct and condition of each person on probation under his supervision and shall report thereon to the court placing such person on probation. Such officer shall use all suitable methods, not inconsistent with the conditions imposed by the court, to aid persons on probation and to bring about improvements in their conduct and condition. Each officer shall keep records of his work; shall keep accurate and complete accounts of all moneys collected from persons

under his supervision; shall give receipts therefor, and shall make at least monthly returns thereof; shall make such report to the Attorney General as he may at any time require; and shall perform such other duties as the court may direct. A probation officer shall have the power of arrest that is now exercised by a deputy marshal. (Mar. 4, 1925, c. 521, Sec. 4, 43 Stat. 1260.)

Sec. 728. *Duties of Attorney General affecting Probation officers, investigations, collection of information, record, forms and statutes, rules, enforcement of laws, annual report.* The Attorney General or his authorized agent shall investigate the work of the Probation Officers and make recommendations concerning the same to the respective Judges and shall have access to the records of all Probation Officers. He shall collect for publication statistical and other information concerning the work of the Probation Officers. He shall prescribe record forms, and statistics to be kept by the Probation Officers and shall formulate general rules for the proper conduct of the probation work. He shall endeavor by all suitable means to promote the efficient administration of the probation system and the enforcement of the Probation Law in all U. S. Courts. He shall incorporate in his annual report a statement concerning the operation of the probation system in such courts. (March 4, 1925, Chap. 521, Sec. 4 as added June 6, 1930 Chap. 406, Sec. 2 also in 46 Stat. 502. See note to Section 726.)

Sec. 557. *Same; Joinder of charges.* When there are several charges against any person for the same act or transaction; for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in several counts and if two or more indictments are found in such case, the court may order them to be consolidated. Revised Statutes, Section 1024.

APPENDIX B.

Opinion.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

JOHN J. KELLY, United States Marshal for the Southern District of New York,
Respondent-Appellant,

against

UNITED STATES OF AMERICA, *ex rel* WILLIAM FRAD,
Relator-Appellee.

BEFORE—MANTON, SWAN and A. N. HAND,
Circuit Judges.

Appeal from the District Court for the Southern District of New York. The orders entered sustained a writ of habeas *corpus* sued out by William Frad and denied a motion to sentence the appellee. John J. Kelly, United States Marshal for the Southern District of New York, appeals.

Reversed.

LAMAR HARDY, United States Attorney, Attorney for Appellant.

CURTIS C. SHEARS, Ass't U. S. Attorney,

FRANK H. GORDON, Special Assistant to the United States Attorney, of Counsel.

HARRIS JAY GRISTON, LOUIS KARASIK, Attorneys for Appellee.

MANTON, Circuit Judge.

March 26, 1934 appellee simultaneously entered a plea of guilty to three indictments. Indictment C 98-116 charged a conspiracy to violate §§220, 221, Title 18, U. S. Code (18 U. S. C. A. §88) and appellee was sentenced to two years imprisonment and to pay a $1,000. fine for which he was to stand committed until paid; indictment C 80-944 charged in five counts the use of passports obtained by false statements as to identity (§§220, 221, Title 18, U. S. Code); and indictment C 96-120 in four counts charged impersonation by representing himself to be another person when entering the United States (§220, Title 8, U. S. Code).

On these last two indictments, the imposition of sentence was suspended and the appellee was placed on probation for a period of four years to begin after he had served the sentence of two years imposed on the first indictment.

November 2, 1935, appellee was discharged from prison and on November 15, 1935 entered his term of probation by signing the standing orders of the court as to probation which required him to report weekly to the probation officer. December 13, 1935, the judge who sentenced him while holding a criminal term in the Southern District of New York, having returned to his home district, the Eastern District of New York, held court on appellee's application for a discharge of probation, at his chambers in the Eastern District of New York, and later signed an order with the venue laid and the order to be entered in the Southern District of New York, reading:

> "Ordered, that the order of probation made herein on the 26th day of March, 1934 and which is in force and effect by the standing probation order of this Court be, and the same is hereby revoked, and the defendant is discharged from further supervision and the proceedings against him in this case be, and the same are hereby terminated."

On a complaint made against appellee, for larceny on the high seas, an order was signed, November 20, 1936, for the issuance of a warrant to apprehend the probationer for viola-

tion of one of the terms of his probation. He was arrested and bailed pending a hearing. Though previously uninformed of the order revoking probation, the United States Attorney advised the appellee on December 2, 1936 that an application would be made to the sentencing judge, again holding court in the Southern District of New York, to vacate his order of December 16, 1935 and that the indictments C 96-120 and C 80-944 would be on the calendar for sentence December 8, 1936. On December 4, 1936, appellee surrendered to the marshal and sued out a writ of habeas corpus. A motion was noticed to commit appellee December 28, 1936. This was consolidated with the argument on the writ. The writ was sustained and the appellee discharged.

The Probation Act (§§724, 725, Title 18, U. S. C.) grants a district judge power after conviction of a crime, to suspend the imposition and execution of sentence and place a defendant upon probation. It also provides powers of revocation or modification of the probation and sets forth the duties of the probationer. Such suspension might be granted on a plea of guilty to the crimes here charged. Section 725 provides:

> "When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation as shall seem advisable * * *."

At any time within the probation period, the probationer may be arrested without a warrant or the court granting probation may issue a warrant for his arrest. This must be served by the probation officer or the United States Marshal, either in the district in which the probationer was put upon probation or in any district in which he is found. The court may then sentence him if reason appears and may revoke the probation or suspension of sentence and may impose any sentence which might originally have been imposed.

Here the three indictments were separate charges of crime. They were not consolidated for trial. The pleas of guilty were separately received although involving crimes in transactions connected together by the same purpose and motive. *U. S.* v. *Greenhaus,* 85 F. 2, 116 (C. C. A. 2), cert. denied November 17, 1936, held that where there are sentences upon several counts in a single indictment, the suspension of a sentence to begin at the termination of a prior one is unlawful and hence an order of probation is invalid and execution of the sentence may be ordered. That rule does not apply to indictments which are separate and not consolidated. Of course, even if it did apply it follows that the suspension could be vacated and execution of the sentence ordered. In *Miller* v. *Aderholt,* 288 U. S. 206, the petitioner was given a suspended sentence and was discharged from custody. He was later arrested and sentenced by another judge. The court held the suspension of sentence for an indefinite period was a void sentence. The cause was held to properly continue on the docket, and "the jurisdiction of the trial court under circumstances such as are here disclosed is not exhausted until sentence is pronounced either at the same or a succeeding term."

In *U. S. ex rel Campbell* v. *Bishop,* 47 Fed. 2, 95 (C. C. A. 5), the prisoner, on a plea of guilty, was sentenced to a fine of $500 and to serve two years confinement with a conditional suspension of the imprisonment if and when the fine was paid. He paid his fine and was released but later arrested for violation of his probation. His probation was revoked, after a hearing, and he was committed for the original two years. It was held that the sentence was unlawful for it was beyond the authority of the court to indefinitely suspend sentences; but it was further held that the district court might eliminate the suspension of sentence and order the commitment of the petitioner.

> "But in such cases there need not be any failure of justice. for, where the conviction is correct and the error

or excess of jurisdiction has been as stated, there does not seem to be any good reason why jurisdiction of the prisoner should not be reassumed by the court that imposed the sentence in order that its defect may be corrected." In re Bonner, 151 U. S. 242, 259.

The district Judge sitting in the Eastern District of New York was attempting to exercise the power of a court in a cause pending in the Southern District. He had no power to revoke the order of probation and terminate the proceedings against the appellee. The Probation Act (§§724, 725, 18 U. S. C. A.) provides for the execution of its provisions by the court in which a defendant pleads guilty or is convicted. *Ackerson* v. *U. S.*, 15 F. 2, 268 (C. C. A. 2).

It was twenty months after the sentencing judge's service in the Southern District was completed when the assumed jurisdiction to act as a court for the Southern District while sitting in the Eastern District. Neither the United States Attorney for the Southern District (§§481-485, Title 28 U. S. C.) nor the Probation Officer for the Southern District (§§726-729, Title 18, U. S. C.) had any jurisdiction to act for the United States in the Eastern District of New York. A District Judge, ordered by the senior Circuit Judge, to hold court in a district other than his own is not thereby empowered to sign and enter orders in a case pending in such other district when absent therefrom and in his own district. cf. *Escos* v. *Zerbst,* 295 U. S. 490; *Riggs* v. *U. S.*, 14 Fed. 2, 5 (C. C. A. 4), cert. den. 273 U. S. 719. The order of the sentencing judge purporting to terminate the appellee's probation was void because of lack of jurisdiction. When he entertained the application and decided it, he was not sitting at that time as a judge of the court of the Southern District.

The appellee, therefore, was subject to sentence if he violated the terms of his probation which had not expired or terminated. The statute expressly grants power to lengthen or end the probation supervision (§725). It is clear that the court may terminate probationary supervision, and the

defendant may be brought before the court under a warrant issued and may be sentenced to any period which might originally have been imposed. *Kaplan* v. *Hecht,* 24 Fed. 2, 664 (C. C. A. 2). An order terminating the probationary supervision merely terminates the power of supervision of the probation officer but not that of the courts. *Crowder* v. *Aderholt,* 46 Fed. 2, 357 (D. Ga.). *In Burns* v. *United States,* 287 U. S. 216, the court affirmed an order revoking probation on one count of the indictment while the defendant was serving a sentence in jail on another count. The court held that while in jail he was subject to the conditions of the probation.

There were separate indictments here and the court could sentence to imprisonment for one and suspend as to the others placing the prisoner on probation to commence during or after the period of incarceration provided it took effect at a fixed time without an indefinite condition. *Miller* v. *Aderholt, supra.*

The appellee is charged with a violation of his parole and the appellant has properly moved in the Southern District to revoke the probation and sentence him upon the second and third indictments. *Burns* v. *U. S., supra; cf. Escoe* v. *Zerbst, supra.*

The orders are reversed and the prisoner remanded for the consideration of the revocation of his probation and for sentence if warranted.

Orders reversed.